

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**WILKES-BARRE HOSPITAL COMPANY LLC
d/b/a WILKES-BARRE GENERAL HOSPITAL**

and

**Cases 04–CA–259936
04–CA–260035**

**WYOMING VALLEY NURSES
ASSOCIATION/PENNSYLVANIA ASSOCIATION
OF STAFF AND NURSING PROFESSIONALS**

Edward J. Bonnett, Jr., Esq., for the General Counsel.
Kaitlin Kaseta, Esq., for the Respondent.
Jonathan Walters, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried virtually on February 24, 2021. Following charges filed on May 5 and 6, 2020, the order consolidating cases, consolidated complaint (complaint) issued on August 28, 2020 (corrected on October 30, 2020).¹ The complaint alleges that Wilkes-Barre Hospital Company LLC d/b/a Wilkes-Barre General Hospital (Respondent/Hospital) violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide and delaying in providing certain relevant and necessary information requested on January 23 and February 18, 2020, by the Wyoming Valley Nurses Association/Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) (Charging Party/Union).² The complaint also alleges that the Hospital violated the same section of the Act by refusing to participate in grievance discussions with the Union’s counsel present.

¹ During trial, I granted, without objection, the General Counsel’s motion to amend the complaint as follows: para. 7(a), to reflect that on February 18, 2021, Respondent provided all requested information described in para. 7(a)(2) and (8) and partially provided requested information described in para. 7(a)(3) and (4). Consequently, the General Counsel also amended para. 7(d) to reflect, that since February 18, 2020, Respondent failed and refused to furnish to Union the information described in 7(a)(3) and (4). Similarly, para. 7(e) was amended to allege that since February 18, 2020, Respondent unreasonably delayed in providing the information responsive to items in 7(a)(2) and (8). “7(e)” was added to para. 9 to reflect the amendments regarding the requests for information.

² All dates are in 2020 unless otherwise indicated.

The Hospital generally denies it violated the Act and challenges the relevance of the Union's information requests. The Hospital alternatively claims that it fully and timely furnished its responses to the Union. The Hospital also asserts that the Union's attempt to have its legal counsel present at grievance meetings violates Section 8(b)(1)(B) and 8(b)(3) of the Act. Finally, Respondent maintains that the complaint be dismissed since Acting General Counsel Peter Sung Ohr lacks authority to prosecute the complaint and that any actions taken by or on behalf of General Counsel Ohr are "ultra vires."

On the entire record and oral arguments, in lieu of briefs, I make the following³

FINDINGS OF FACT

I. JURISDICTION

Respondent is a limited liability company operating an acute-care hospital in Wilkes-Barre, Pennsylvania (the Hospital). During the past year, Respondent, in conducting its operations, received gross revenues more than \$250,000 and purchased and received at the Hospital goods valued more than \$50,000 directly from points outside the Commonwealth of Pennsylvania. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES AND RELEVANT FACTS

A. *The Hospital and Union*

At all material times, Jaime Brogan (Brogan), the Hospital's human resources director has been a supervisor and agent of the Hospital within the meaning of Section 2(11) and 2(13) of the Act. In addition, Kaitlin Kaseta, Esq. (Kaseta) has been an agent of the Hospital within the meaning of Section 2(13) of the Act. Brogan served as the Hospital's only witness and Kaseta served as the only legal representative at trial. As an acute care hospital, Respondent provides critical care, trauma care, emergency care and perioperative care.

The following employees of the Hospital (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time and per diem graduate and registered nurses employed by Wilkes Barre Hospital Company, LLC, 575 North River St, Wilkes-Barre, including certified registered nurse anesthetist, nurse epidemiologist, clinical educator, continuing care nurse (discharge planner), tumor

³ After the conclusion of the trial, the parties presented oral arguments on the record on February 26, 2021, in lieu of written briefs. Although not evidence, these arguments are contained in the "Oral Arguments" transcript dated February 26, 2021.

registry nurse, patient advocate, RN tech scanner (cardiology), RN special procedures, instructor, cardiology/ultrasound RN, lead instructor (Hospital Services division), cardiology RN, neurophysiology RN, radiation oncology RN, respiratory RN, radiology special procedures, cath. Lab nurse, RN unit secretary, IV therapy nurse, staff RN, coordinator QI, coordinator UM, clinical care coordinators, relief charge nurse, employee health nurse, occupational health nurse/corporate health services nurse/case manager, family enhancement facilitator, family outreach facilitator, health awareness facilitator, diabetes center nurse educator, physical therapy RN, cardiac rehabilitation nurse, Mother-to-be program RN, pain management RN, ambulatory/outpatient diagnostic RN, women's health specialist, health enhancement associate, lead instructor (health enhancement), coordinator clinical support (family outreach), O.R. nurse, and service coordinator I, case managers, Wilkes Barre Academic Medicine, LLC registered nurses, and childbirth facilitator.

At all material times, the Hospital has recognized the Union as the exclusive collective-bargaining representative of the Unit. This recognition has been embodied in successive collective-bargaining agreements (CBAs), the most recent of which is effective by its terms from January 30, 2019 through January 31, 2022. Therefore, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit. Alex Lotorto (Lotorto) has been the Union's staff representative since September 2018 and in this case, served as the General Counsel's only witness.

B. Requests for Information January 23, 2020 (and underlying grievances)⁴

Fleming Grievance No. 01–19–0002–4373 (4373) filed July 22, 2019

The Union filed a grievance dated July 22, 2019 alleging that:

On 7-19-19, management awarded a passport non-bargaining unit RN an available overtime shift. Multiple bargaining unit employees were signed up for this shift. This is a violation of Article 19, Section 15 [of the CBA]. Both clinical leader and director were made aware.⁵

The grievance form indicates that it was "Filed as a class action." Under the specific claim section, it reads: "1 bargaining unit nurse, whose turn it was to receive the bonus shift,

⁴ GC Exh. 2 references these grievances by their numbers as set forth below.

⁵ The Hospital's non-bargaining, passport RNs are also referred to in these proceedings as "contract" or "agency" RNs.

was denied.” Under the specific relief section, the grievance states: the “Bargaining unit nurse who’s turn it was for this shift be paid for their full shift with bonus and all compensation that may be deemed just and equitable and be made whole.” RN Jamie Fleming (Fleming) signed as the grievant and RN Danny Walton (Walton) signed as the authorized Union steward.⁶ The grievance did not indicate that Fleming was the affected nurse. (GC Exh. 5.)

Walton Grievance No. 01–19–0002–4371 (No. 4371) filed July 22, 2019

The Union filed another grievance dated July 22, 2019, but this time named Walton as the grievant and Fleming as the authorized Union steward. The Union alleged that:

On 7-22-19 a Per Diem Nurse was allowed to work her full shift while full time bargaining unit nurses were cancelled contrary to the order of cancellation Article in the CBA.” The article cited was Article 15, Section 1A.⁷

The Union also noted on this grievance: “Filed as a Class Action.” Under the specific claim section, it reads: “One bargaining Unit nurse was cancelled who should not have been.” Requested damages included paying the bargaining unit nurse who was cancelled out of turn for the hours missed and made “whole in every way, and all compensation that may be deemed just and equitable.” This claim regarding order of cancellation in the CBA relates to the order by which the Hospital may cancel an employee’s shift due to low census or volume of cases. Walton was not named as the affected nurse. (GC Exh. 6.)

On July 26, 2019, the Hospital rejected both above grievances as “invalid” because they did not meet the requirements of CBA Article 12, Sections 5 and 6. (GC Exh. 5–6.) Nevertheless, these grievances are currently pending arbitration and individually scheduled to be heard in May and June 2021.

Referenced CBA Articles

The CBA article referenced in the grievance 4373 filed by Fleming, Article 19, Section 15, covers hours and overtime. This section along with Section 6 prioritizes eligible full-time bargaining unit employees over bargaining unit per diem employees in assignment of overtime.

The CBA article referenced in the grievance 4371 filed by Walton, Article 15, Section 1(a), pertains to low census staffing and reads as follows:

⁶ Both Fleming and Walton were Union stewards/representatives authorized to file grievances on behalf of bargaining unit employees, including the Hospital’s RNs.

⁷ Per diem RNs are included in the bargaining unit but work a limited number of hours per month. (Tr. 46–47.)

Notwithstanding Article 14, 'Seniority,' the Employer retains the discretion to temporarily reduce staffing on a given unit and shift due to decreased census (or volume), subject to the following order or reassignment.

(a) Casual, temporary, per-diem and agency personnel and regular employees working overtime will be reassigned or cancelled.

There is no dispute presented as to whether the CBA provides for an order of cancellation or providing overtime.

C. January 23, 2020 Request for Information Pertaining to Fleming and Walton Grievances

In an email to Kaseta, dated January 23, the Union, by Lotorto, requested the following information in connection with both Fleming and Walton grievances:

1. The names(s) of nurses in the Wilkes-Barre General Hospital Operating Room who were cancelled on 7/19/19 and 7/20/19.
2. The duration of time that each respective nurse(s) were cancelled during their regular shift.
3. The wage rates for each respective nurse(s) who were cancelled as of 7/19/19 and 7/20/19.
4. The names of all contracted agency staff RNs who worked on 7/19/19 and 7/20/19.
5. The names of all per diem staff RNs who worked on 7/19/19 and 7/20/19.
6. Documentation of cancellation rotation among RNs for the entire month of July 2019.

(GC Exh. 2.)⁸ After not receiving a response, Lotorto reaffirmed the Union's information request with emails to Kaseta on February 5, Brogan on February 11, and then to Kaseta and Carmody on February 5. Lotorto asked that the information be provided by January 31. (GC Exh. 2, pp. 033–034, 043–044.) Kaseta waited 21 days, without explanation, before she reached out to Lotorto by email on February 13. First, she chastised him for communicating with Brogan about cases pending arbitration and then she stated that the Hospital:

Reserves its right to object to the timeliness of the request for information (where the grievances were filed many months ago, and arbitration has already been demanded by the Union), and the relevance of the request for information. In order to

⁸ See GC Exh. 2, pp. 033 and 034. Note that during the trial, the parties referenced the pages in this exhibit by the numerical Bates numbering in the top right-hand corners of each page.

potentially facilitate further response, however, I request that the Union delineate which of the enumerated requests below pertain to [American Arbitration Association] AAA Case No. 01–19–0002–4371, and which of the enumerated requests below pertain to AAA Case No. 01–19–0002–4373. I additionally request that, for each enumerated request, the Union specify the relevance of the request to the case at issue—given the dates associated with the information you have requested, and the ambiguity with regard to the case to which each enumerated request pertains. I am unable to ascertain the relevance of each request as written without further explanation.

(GC Exh. 2, pp. 034–035.) On the same date, Lotorto informed Kaseta that AAA case 4371 related to “the per diem nurse on 7/20/19 being allowed to work while a full-time staff [nurse] was cancelled in the OR.”⁹ He also stated that AAA case 4373 pertained to “an agency nurse on 7/19/19 being allowed to work while a full-time staff nurse was cancelled in the OR.” Lotorto typed his explanations in red font after each enumerated request and made corrections with “strikethrough amendments” as follows:

- 1) The name(s) of nurses in the Wilkes-Barre General Hospital Operating Room who were cancelled on 7/19/19 and 7/20/19. This information is necessary to determine the names of any and all nurses who were cancelled for each case.
- 2) The duration of time that each respective nurse(s) were cancelled during their regular shift. This information is necessary to determine how much time each nurse was cancelled in violation of the cancellation order in the CBA for each case.
- 3) The wage rates for each respective nurse(s) who were cancelled as of 7/19/19 and 7/20/19. This information is necessary to calculate the amount of money each nurse is owed in each case.
- 4) The names of all contracted agency staff RNs who worked on 7/19/19 and 7/20/19. This information is necessary to determine which agency nurse was allowed to work in place of a full-time staff RN in violation of the cancellation order in the CBA on 7/19/19 for case 01–19–0002–4373
- 5) The names of all per diem staff RNs who worked on 7/19/19 and 7/20/19. This information is necessary to determine which per diem nurse was allowed to work in place of a full-time staff RN in violation of the cancellation order in the CBA on 7/20/19 for case 01–19–0002–4371

⁹ In a subsequent email below Lotorto corrected the date the full-time staff nurse was cancelled to July 22, 2019 (from July 20, 2019).

6) Documentation of cancellation rotation among RNs for the entire month of July 2019. **This information is necessary to determine whose turn it was to be cancelled in the event more than one nurse was cancelled on each day.**

(GC Exh. 2, pp. 035–036.) Lotorto “[predicted]” both cancellations had been “an aberration or error on the part of an OR manager” as he “had not been notified” of other instances. He believed the former HR director’s rejection of the grievances, without discussion or attempt at “simple resolution,” forced the Union to move to arbitration. He testified, however, that he was not sure if there had been other instances cancelling staff nurses or denying the overtime out of order. (Tr. 43.)

On February 19, Kaseta pointed out inconsistencies between the facts alleged in the grievances and Lotorto’s descriptions above and set forth the following responses in blue text:¹⁰

1) The name(s) of nurses in the Wilkes-Barre General Hospital Operating Room who were cancelled on 7/19/19 and 7/20/19 . This information is necessary to determine the names of any and all nurses who were cancelled for each case.

Given the allegations contained in the grievance underlying AAA Case No. 01–19–0002–4373, which make no mention of cancellation, please explain the relevance of this request to that case. Given that the allegations contained in the grievance underlying AAA Case No. 01–19–0002–4371 are alleged to have occurred on July 22, 2019, please explain the relevance of this request to that case. Furthermore, please explain the relevance of information concerning cancellation of any other nurses, besides Danny Walton, in the WBGH Operating Room, where the named Grievant in AAA Case No. 01–19–0002–4371 is Danny Walton, and where the underlying grievance alleges that only Walton was cancelled.

5) The names of all per diem staff RNs who worked on 7/19/19 and 7/20/19 . This information is necessary to determine which per diem nurse was allowed to work in place of a full-time staff RN in violation of the cancellation order in the CBA on 7/20/19 for case 01–19–0002–437.

Given the allegations contained in the grievance underlying AAA Case No. 01–19–0002–4373, which make no mention of cancellation, please explain the relevance of this request to that case. Furthermore, please explain the relevance of your request for information concerning July 20, 2019,

¹⁰ For each of the remaining emails between Kaseta and Lotorto, I have repeated the Request for Information (RFI) and Lotorto’s initial explanation with their subsequent responses in red (Lotorto) or blue (Kaseta) text.

where the grievance underlying AAA Case No. 01-19-0002-4373 concerns events which allegedly took place on July 19, 2019.

6) Documentation of cancellation rotation among RNs for the entire month of July 2019. This information is necessary to determine whose turn it was to be cancelled in the event more than one nurse was cancelled on each day. Given the allegations contained in the grievance underlying AAA Case No. 01-19-0002-4373, which make no mention of cancellation, please explain the relevance of this request to that case. Given that the allegations contained in the grievance underlying AAA Case No. 01-19-0002-4371 are alleged to have occurred on July 22, 2019, please explain the relevance of this request to that case. Furthermore, please explain the relevance of information concerning cancellation of any other nurses, besides Danny Walton, in the WBGH Operating Room, where the named Grievant in AAA Case No. 01-19-0002-4371 is Danny Walton, and where the underlying grievance alleges that only Walton was cancelled.

(GC Exh. 2, pp. 036-037.) Kaseta repeated the same comment from RFI #1 above for RFI #2 and #3 concerning the duration of time and wage rate for each respective nurse cancelled. For RFI #4, she restated the second sentence of RFI #1.

In his next email on February 20, Lotorto specified the relevance of each RFI in red text:

- 1) The name(s) of nurses in the Wilkes-Barre General Hospital Operating Room who were cancelled on 7/19/19 and 7/22/19. This information is necessary to determine the names of any and all nurses who were cancelled for each case. In both cases, at least one nurse was cancelled out of order. In case ending #4371, a per diem nurse was allowed to work while at least one bargaining unit nurse was cancelled. In case ending #4373, an agency nurse was allowed to work while at least one bargaining unit nurse was cancelled. It is necessary to have a list of those cancelled on both 7/19/19 and 7/22/19 to determine to whom the remedy of compensation should effect if there were more than one RN cancellations on each date . The case was filed as a class action on behalf of the bargaining unit and includes all affected RNs due to the low census cancellation order in the

CBA not being followed/contract interpretation. The listing of 7/20/19 was an error and is amended above to 7/ 22/19.¹¹

2) The duration of time that each respective nurse(s) were cancelled during their regular shift on 7/19/19 and 7/ 22/1. This information is necessary to determine how much time each nurse was cancelled in violation of the cancellation order in the CBA for each case.

The duration of time is necessary to determine the amount of compensation is [sic] due for the affected RN.

3) The wage rates for each respective nurse(s) who were cancelled as of 7/19/19 and 7/ 22/19. This information is necessary to calculate the amount of money each nurse is owed in each case.

It is necessary to have the wage rates of those cancelled on both 7/19/19 and 7/22/19 to determine to determine [sic] the amount of compensation is [sic] due for the affected RN.

4) The names of all contracted agency staff RNs who worked on 7/19/19 and 7/ 22/19 . This information is necessary to determine which agency nurse and the name of the nursing agency they were employed by was allowed to work in place of a full-time staff RN in violation of the cancellation order in the CBA on 7/19/19 for case 01–19–0002–4373.

In case ending #4373, an agency nurse was allowed to work while at least one bargaining unit nurse was cancelled. It is necessary to identify the agency nurse's name for the purposes of obtaining testimony from witnesses regarding her work assignment that day. I have also requested the name of the nursing agency so that I may contact them if I find it necessary to subpoena the nurse.

5) The names of all per diem staff RNs who worked on 7/19/19 and 7/ 20/19 . This information is necessary to determine which per diem nurse was allowed to work in place of a full-time staff RN in violation of the cancellation order in the CBA on 7/ 22/ 19 for case 01–19–0002–4371.

In case ending #4371, a per diem nurse was allowed to work while at least one bargaining unit nurse was cancelled. It is necessary to identify the per diem nurse's name for the purposes of obtaining testimony from witnesses regarding her work assignment that day.

6) Documentation of cancellation rotation among RNs for the entire month of July 2019. This information is

¹¹ In RFI #2, #3 and #6, Lotorto also restated the same language as in the first 3 and last 2 sentences of RFI #1. Therefore, I did not repeat it here.

necessary to determine whose turn it was to be cancelled in the event more than one nurse was cancelled on each day.

It is necessary to have documentation of the cancellation rotation for July 2019 to determine whose turn it was on each respective day to be cancelled. It is our position that compensation should be owed to each respective nurse in the amount of the time they were cancelled, times their wage rate, including any ancillary benefits such as vacation and sick time accrual.

(GC Exh. 2, pp. 038–040.)

On February 28, Kaseta retained the Hospital’s position “that the majority of the information that the Union is seeking is not relevant to the two grievances, as written and filed by the Union, in connection with which you have stated the Union seeks the information.” She noted the hospital had no obligation to produce information that is not relevant to the Union’s requests. Nevertheless, she provided the same response to requests 1 through 3 pertaining to grievance 4371: “Danny Walton was not cancelled on July 22, 2019.” (GC Exh. 2, p. 040.)

Lotorto and Kaseta continued their email exchanges on March 2. Lotorto asked Kaseta to review the Union’s two grievances, reemphasizing that:

They were filed as class action grievances on behalf of the bargaining unit due to the failure of the OR manager to interpret the low census cancellation order correctly in each instance. They do not claim that Danny Walton is the nurse cancelled in either instance. The union is seeking to determine which nurse(s) were cancelled in order to determine which nurse(s) are due compensation for their cancelled hours and to determine who to subpoena for an arbitration. That is relevant and I will give you the benefit of the doubt that you misunderstood and are not attempting to obstruct the union's rightful investigation of a contract violation.

(GC Exh. 043.) In turn, Kaseta insisted she had not misunderstood the requests and proceeded with the following (set forth in part):

The grievance underlying AAA Case No. 01–19–0002–4371 lists one individual—Mr. Walton—as the Grievant. The underlying grievance does not include the names or signatures of any other purported member of the alleged class. Under both the (woefully incomplete and contractually inadequate) statement of facts and remedy sections, the

underlying grievance states that ONE bargaining unit nurse was cancelled on July 22, 2019.

Similarly, the grievance underlying AAA Case No. 01-19-0002-4373 lists one individual—Ms. Jamie Fleming—as the Grievant. The underlying grievance does not include the names or signatures of any other purported member of the alleged class. Under both the (equally incomplete and contractually inadequate) statement of facts and remedy sections, the underlying grievance states that ONE bargaining unit nurse did not receive an overtime shift upon which they had bid on July 19, 2019.

(GC Exh. 2, pp. 043-044.) Kaseta added that for those reasons, “it is clear that neither grievance is a class action, as was explained by the Hospital to your Union when the grievances were rejected.” (Id.) She reiterated that inconsistencies and defects in the grievances failed to meet the CBA Article 12 standards for filing and accepting grievances. Kaseta further expressed her view that had the Union complied with those standards, it would already possess information about identities and schedules of the full-time bargaining unit nurses allegedly cancelled and denied overtime. (Id.)

At trial, Lotorto admitted he had mischaracterized the Hospital’s improper award of overtime on July 19, 2019 as a cancellation. (Tr. 105, 109.) However, I find it is evident, based on Kaseta’s comments above, that she well understood at least by March 2, if not before, that the Union’s reference in the request for information to “cancellation” of agency nurses on July 19, 2019 actually pertained to full-time bargaining unit nurse or nurses denied overtime on July 19, 2019.

Lotorto maintained that the grievances were filed as class actions “on behalf of the bargaining unit for contract enforcement,” and never asserted that Fleming and Walton were denied overtime or cancelled. (Tr. 40-42, 54-55; GC Exh. 043.) Lotorto also testified that although he was told only one nurse was involved in each incident, he wanted to confirm that was the case. (Tr. 58.) When pressed on whether he and or the Union stewards knew what nurses had been affected, he explained that they expected Fleming and Walton to present their witnesses during a grievance meeting. Instead, the Hospital immediately rejected the grievances and refused to meet to discuss or resolve them. Lotorto further testified that “[his] impression is that they (the Union stewards) had an idea of who it was, which is the reason why [the grievances were] filed.” (Tr. 123-126.) In addition, he stood by the Union’s reasons for requesting the information: to interview and potentially subpoena witnesses, further investigate the grievances, and make an assessment on how to proceed, or not, with the arbitrations. He also explained how he continued his attempts to settle the grievances in his initial emails to the Hospital on January 21 and again on January 23. (Tr. 43, 52-53; GC Exh. 2, pp. 032-035.) Other than declaring on February 28 that “Danny Walton was not cancelled on July 22, 2019,” the Hospital has not furnished the Union with information requested on January 23.

D. Request for Information February 18, 2020 (and Underlying Grievance)

On February 19, unit employee Joseph Whiteduck, RN filed a grievance alleging that on February 17, 2020, the Hospital terminated him without just cause. (GC Exh. 9.) He denied the Hospital's claim that he violated policy by taking an unauthorized break. (GC Exh. 4, pp. 005–010.)

By email to Jaimie Brogan, dated February 18, Lotorto sent the following request for information needed to investigation Whiteduck's termination:

- 1) A copy of the discipline/termination notice issued on 2/17/20;
- 2) Emergency Department unit schedule for the date of the alleged incident that resulted in discipline on 2/17/20;
- 3) A copy of the schedule of all employees in the Emergency Department on the date of the alleged incident that resulted in termination on 2/17/20, to include but be not limited to management level employees and/or
- 4) Patient assignment list for all staff in the Emergency Department for the date of the alleged incident that resulted in discipline on 2/17/20;
- 5) Supervisory notes related to the discipline for the date of the alleged incident that resulted in discipline on 2/17/20;
- 6) A copy of any and all policies Mr. Whiteduck is alleged to have violated.
- 7) The employer's basis for disallowing union representation for Mr. Whiteduck during his disciplinary meeting.
- 8) Any and all information relied upon by management in your decision to discipline in any format including but not limited to investigatory notes, witness statements, a list of witnesses interviewed and corresponding notes...

(GC Exh. 3, p. 029.)

On March 3, 2020, Brogan exclaimed that, "it is remarkable that your union your union [sic] would file a grievance without any information regarding an alleged violation." She did, however, provide as a "courtesy" the following:¹²

¹² Ironically, Brogan accused Lotorto of intentionally (and "erroneously") dating the information request "February 19, 2020" and "[misrepresenting] the date he emailed it to her, "2/19/20," while she also misstated dates in her March 3 response. (GC Exh. 4, p.001)). Nevertheless, Lotorto acknowledged that Brogan probably would have received his request on February 22. (GC Exh. 3, p. 029.) I agree with Lotorto's characterization of Brogan's preoccupation with every minor error in his request as "petty." (See R. Exh. 1.)

1) **Request:** A copy of the discipline/termination notice issued on 2/17/20.

Response: The requested document is included with this correspondence.

2) **Request:** Emergency Department unit schedule for the date of the alleged incident that resulted in discipline on 2/17/20.

Response: The Hospital does not understand the relevance of the “Emergency Department unit schedule” as it relates to the circumstances involving Mr. Whiteduck’s termination. Please explain your view of relevance.

3) **Request:** A copy of the schedule of all employees in the Emergency Department on the date of the alleged incident that resulted in termination on 2/17/20, to include but be not limited to management level employees and/or contracted medical personnel, including but not limited to physicians and EMT’s.

Response: The Hospital does not understand the relevance of this request as it relates to the circumstances involving Mr. Whiteduck’s termination. Please explain your view of relevance.

4) **Request:** Patient assignment list for all staff in the Emergency Department for the date of the alleged incident that resulted in discipline on 2/17/20.

Response: Additionally, your request, as stated, impermissibly implicates the Health Insurance Portability and Accountability Act of 1996. Please explain your view of the relevance.

5) **Request:** Supervisory notes related to the discipline for the date of the alleged incident that resulted in discipline on 2/17/20.

Response: The requested documents are included with this correspondence.

6) **Request:** A copy of any and all policies Mr. Whiteduck is alleged to have violated.

Response: The requested documents are included with this correspondence.

7) **Request:** The employer’s basis for disallowing union representation for Mr. Whiteduck during his disciplinary meeting.

Response: The Hospital would refer you to the current collective bargaining agreement between the Hospital and the Union including *Article 2 – Management Rights*.

8) **Request:** Any and all information relied upon by management in your decision to discipline in any format

including but not limited to investigatory notes, witness statements, a list of witnesses interviewed and corresponding notes, etc.

Response: Your request is overly broad and overly non-specific. I would refer you to the Hospital's responses to item (1) through item (6) above.

(GC Exh. 4, pp. 001–004, 005–027.)

In an undated letter, sent shortly after Brogan's March 3 response, Lotorto delineated the purpose for the remaining requests as follows:

RFI #2 – The Union seeks the entire Emergency Department schedule for purposes of determining potential witnesses.

RFI #3 – The Union seeks the entire Emergency Department schedule for purposes of determining potential witnesses.

RFI #8 – The Union needs this information to evaluate the grievance. Clearly the Union has the right to know the extent of the Hospital's investigation that culminated in the Hospital terminating the Grievant.

Lotorto also modified RFI #4 to: "merely to seek the Grievant's patient assignment list for the date of the alleged incident" as "[t]he Union is not seeking the names of any patients; they can be omitted." Regarding RFI #7, he acknowledged the Hospital's response, but believed clarification of the Hospital's "exact" position would be helpful. (R. Exh. 1.)

By email dated February 18, 2021, Brogan advised Lotorto that in preparation for trial, she discovered the Union may have inadvertently failed to send previously prepared documents responsive to the Union's request for information. She attached a letter dated April 14, 2020 and the referenced documents. (R. Exh. 2.) Brogan attributed the probability that she failed to transmit this information in April 2020 to the large number of email exchanges with and information requests from the Union and onset and "uptick" of COVID-19 cases. She described her many responsibilities during "just an extraordinary time" ensuring appropriate Hospital protocols and standards were updated and safety of patients during the pandemic. Despite some uncertainty, the evidence shows that she did not send this information to the Union until February 18, 2021.¹³ (Tr. 149–150.)

In the April 2020 response, Brogan reserved the right to object to the requests as overly broad, vague, ambiguous, and irrelevant, but supplied the name of the same individual, "Doreen Merenich" in response to requests 2 and 3. She did not provide the entire ED schedule. In addition, she related that Whiteduck was assigned to care for six patients on the date of his termination. In response to request 7, she clarified the reasons why Whiteduck had

¹³ On cross-examination, Brogan admitted that a thorough search of her records and emails confirmed she failed to transmit the documentation to the Union in April 2020. (Tr. 148–149, 157–159.)

no right to representation during his disciplinary meeting. Brogan also attached additional documents responsive to request 8. Based on receipt of the above described documents, the General Counsel amended complaint paragraphs 7 and 9 to reflect that in February 18, 2021, Respondent provided all documents responsive to requests 2 and 8 and partially provided documents responsive to requests 3 and 4.¹⁴

E. Respondent's March 2020 Refusal to Participate in Union Discussions with Union Counsel Present

On February 27, Lotorto communicated his availability to meet with Brogan on March 4, and suggested they hold a joint meeting on both Whiteduck's grievance and a grievance filed by the Hospital against the Union.¹⁵ On February 27, Brogan rejected a meeting at the Hospital to discuss both grievances but agreed to meet on March 4 at the Union's office to discuss the Hospital's grievance against the Union. (GC Exh. 7, p. 002.) On March 3, Lotorto notified Brogan of the Union's availability to meet on March 4 at 3:30 pm at the Hospital and advised that Union attorney, Jonathan Walters (Walters), in addition to union officers or advocates would be joining him. The next morning, Brogan emailed her refusal to meet at the Hospital with the Union's attorney present. Brogan only agreed to meet after Lotorto asked if she would do so without Union counsel (Walters). (GC Exh. 7, pp. 001–002, 004–005.)

Lotorto testified that he wanted to have Union counsel present because he did not want to represent the Union and be the primary witness in the Hospital's grievance. He also pointed out that the CBA does not preclude a party from designating its attorney as a representative during grievance proceedings. (Tr. 78–85, 135–138.) At trial, Brogan gave various reasons for refusing to meet with the Union's counsel, including: the Union and Hospital had never involved their attorneys in the grievance process; she felt unqualified to represent the Hospital against such an experienced and skilled attorney (as Walters); she felt compelled to also have legal counsel which would have required the Hospital to incur "costs;" and the Union had not listed Walters as one of its representatives in either January or July 2020 pursuant to Article 12, Section 8. (GC Exh. 8.) However, she never communicated any of these reasons to the Union and admitted that no one had prevented the Hospital from obtaining its own legal counsel. (Tr. 135–138, 151–152.) Further, the record reflects that she failed to mention that the same CBA provision alternately permits the Union to amend in writing its list of representatives at any time "immediately upon a modification to such representatives." (GC Exh. 8.) The evidence also shows that the Union furnished a list of its eligible officers and representatives to the Hospital in January 2020 as required by the CBA

¹⁴ See fn. 1 above and GC Exh. 12.

¹⁵ On February 26, 2020, the Hospital filed its own grievance alleging the Union violated CBA Art. 7, Sec. 1 and Art. 11, Sec. 1 by "accessing the Hospital facility for a purpose other than administering the Agreement." More specifically, the Hospital alleged that on February 17, Lotorto attended Whiteduck's disciplinary meeting when he had no right to do so, refused to leave and engaged in unacceptable behavior towards Brogan. (Tr. 85–87; R. Exh. 4.) Of note, on August 19, the Region dismissed the Hospital's CB charge against the Union involving the same alleged misconduct, finding that after careful investigation, the charge lacked merit and thus did not violate Sec. 8(b)(1)(B) or 8(b)(3) of the Act. On September 24, 2020, General Counsel Robb denied the Hospital's appeal. (GC Exhs. 10–11.)

and notified the Hospital within 5 days of the Hospital's February 26 grievance of its intent to include Walters as a representative. (Tr. 80–81; GC Exh. 7, p. 002; R Exhs. 3–4.)

III. LEGAL ANALYSIS

A. Whether Acting General Counsel, Peter Sung Ohr, Lacks Authority to Prosecute the Consolidated Complaint in Violation of the Act, as Amended, 29 U.S.C. §§ 151 et seq.

In an on the record motion to dismiss (and as an affirmative defense), Respondent argued that President Biden's (alleged) unlawful removal of former General Counsel Peter Robb invalidates any proceedings related to this consolidated complaint. On February 24, 2021, I issued an order from the bench denying Respondent's motion. First, the complaint and corrected complaint were filed and maintained during General Counsel Robb's tenure. Further, there is no evidence that there would be a different outcome in this case or that the case would be withdrawn absent former General Counsel Robb's removal. Even when the Supreme Court invalidated a president's improper Board recess appointments to the Board, a constitutionally valid 3-member Board considered many of the affected, vacated decisions and underlying records de novo, as well as any exceptions filed, and adopted or reaffirmed the decisions.¹⁶

The General Counsel points to the Act's complete silence in Section 3(d) on removal of general counsels by a president, in contrast with Section 3(a)'s specific inclusion of a removal provision limiting a president's authority to remove a Board member. I agree that the notable exclusion and distinction between those sections appear to demonstrate Congress' intent not to place any limitations on a president's authority to remove a general counsel. I have considered this argument as well as those offered by the Union and Respondent in their opening and closing arguments. Both the General Counsel and Respondent relied on the Supreme Court's decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) permitting Congress to limit removal of certain presidential appointees, such as those in the Federal Trade Commission (FTC), with multimember bodies of experts who are balanced along partisan lines, are appointed to staggered terms and perform quasi-legislative and quasi-judicial functions. The General Counsel believes *Humphrey's Executor* would not support imposing similar limits on a general counsel who is not a member of the Board, who does not perform both quasi-judicial and legislative functions and basically serves in an investigative, prosecutorial capacity independent of Board members. Contrarily, Respondent argues that *Humphrey's Executor* applies to the NLRB due to its similar multimember structure. It appears that *Humphrey's Executor* is distinguishable from the one at hand for the foregoing reasons. Recently, the Supreme Court in *Seila Law v. Consumer Finance Protection*

¹⁶ *Noel Canning*, 573 U.S. 513 (2014) (holding 3-day intrasession recess appointments of Members Sharon Block, Richard Griffin and Terrence Flynn were invalid—for reasons other than that alleged herein). See for example, *DirecTV U.S. DirecTV Holdings, LLC*, 362 NLRB 415, 415 (2015) (in view of the Supreme Court's decision in *Noel Canning*, the Board considered "de novo the judge's decision and the record in light of the exceptions, cross-exceptions, and briefs," as well as the judge's findings, and affirmed the judge's recommended decision).

Bureau (CFPB), 591 U.S. ____; 140 S.Ct. 2183 (2020) addressed a novel situation where it held that a “for-cause restriction of President’s executive power to remove CFBP’s single Director violated constitutional separation of powers.” In doing so, the Court distinguished the CFBP as an independent agency run by a single director wielding
 5 significant executive power versus a multimember body. In essence, the CFBP Director functions much as the Board’s members and General Counsel rolled into one, far exceeding the Board’s General Counsel’s investigative and prosecutorial roles.

Cases challenging improper NLRB General Counsel appointments involve those pursuant to 5 U.S.C Section 3345(a), as amended by the Federal Vacancies Reform Act (FVRA) of 1998.¹⁷ However, it is notable that in *Lutheran Home at Moorestown*, 334 NLRB 340, 341–342 (2001), the Board determined it “[did] not believe it appropriate for us to decide, in this unfair labor practice case, whether or not the President of the United States made a proper appointment under that statute.”
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Since the record closed in this case, the Board on March 1, 2021, determined that a respondent’s motion to dismiss due to former General Counsel Robb’s removal was premature. In *H&M International Transportation, Inc.*, Case 05–CA–241380 (March 1, 2021), the Board denied the Respondent’s request for permission to file a special appeal of the judge’s bench order because it “failed to establish that its objections cannot be appropriately
 20 addressed later in the proceedings, such as on exceptions to the Board pursuant to Section 102.46 of the Rules and Regulations, in the event the Respondent receives an adverse ruling.” Although I find the General Counsel’s and the Union’s arguments are more persuasive than those of Respondent, I will stand by my bench order denying the motion to dismiss and defer
 25 to the Board to ultimately decide this matter if necessary.

B. Legal Standards Regarding Requests for Information

An employer’s duty to bargain includes a general duty to provide information requested
 30 by the union that “is potentially relevant and would be of use to the union in fulfilling its responsibilities as the employees’ bargaining representative.”¹⁸ *NLRB v. Truitt, Mfg. Co.*, 351 U.S. 149 (1956); *E.I. DuPont de Nemours and Co.*, 366 NLRB No. 178, slip op. at 4 (2018), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436, 438 (1967); *United Parcel Service of America*, 362 NLRB 160, 161–162 (2015); *Postal Service*, 332 NLRB 635, 635 (2000).
 35 Generally, information relating to wages, hours, and terms and conditions of employment of unit employees is presumptively relevant and must be furnished to the union upon request unless the employer provides a legitimate reason for not doing so. *CVS Albany, LLC*, 364 NLRB No. 122, slip op. at 2 (2016); *Matthews Readymix, Inc.*, 324 NLRB 1005, 1009 (1997), enf. denied on other grounds 165 F.3d 74 (D.C. Cir. 1999); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005); *Curtis-Wright Corp.*, 145 NLRB 152 (1963), enf. 347 F.2d 61 (3d
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¹⁷ The FVRA of 1998 is an “‘alternate procedure’ for temporarily occupying an office.” *Lutheran Home at Moorestown*, above at 340, citing in part, S. Rep. No. 105–250, 105th Cong., 2d Sess. 17 (1998)).

¹⁸ Sec. 8(a)(5) of the Act provides that it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of its employees.” 29 U.S.C. § 158(a)(5).

Cir. 1965). Further, information involving any stage of arbitration is relevant and should be provided as the goal is to also encourage resolution of disputes short of arbitration hearings. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). Thus, the employer must furnish documentation relating to the union representative's core responsibilities of processing grievances and arbitrations, enforcing compliance of existing CBAs and representing employees in the disciplinary process.

When requested information involves employees outside of the bargaining unit, it is the union's burden to demonstrate relevance. *United States Testing*, 324 NLRB 854, 859 (1997), *enfd.* 160 F.3d 14 (D.C. Cir. 1998); *Reiss Viking*, 312 NLRB 622, 625 (1993) *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). This burden is "not exceptionally heavy," as "the Board uses a "liberal, discovery-type standard" in determining relevancy, with the sought-after information not having to be dispositive of the issue between the parties. *NLRB v. Acme Industrial Co.*, 385 U.S. at 437; *G4S Secure Solutions (USA), Inc.*, 369 NLRB No. 7, slip op. at 2 (2020); *DirectSat USA, LLC*, 366 NLRB No. 40, slip op. 1, fn. 2 (2018). Rather, it must have some bearing upon the matter, be of probable or potential use to the union in carrying out its statutory responsibilities and be more than a mere suspicion. *Postal Service*, 332 NLRB 635, 636; *Shoppers Food Warehouse, Corp.*, 315 NLRB 258, 259 (1994); *Bacardi Corp.*, 296 NLRB 1220 (1989). In other words, a union must have "a reasonable belief supported by objective evidence that the requested information is relevant, unless the relevance of the information should have been apparent to the Respondent under the circumstances." *Public Service Co. of New Mexico*, above at 574. See also *Disneyland Park*, 350 NLRB 1256, 1258 (2007); *Shoppers Food Warehouse*, 315 NLRB at 259. However, the Board does not assess the merits of the underlying grievance or dispute between the parties to determine relevance. *Postal Services*, 332 NLRB 635 (2000).

Finally, since a party's duty includes providing relevant information in a timely fashion, the Board finds that "an unreasonable delay in furnishing requested information is as much a violation of the Act as an out-and-out refusal to supply such information." *Teamsters Loc. 921 (San Francisco Newspaper)*, 309 NLRB 901, 901-902 (1992); *Monmouth Care Center*, 354 NLRB 11, 51 (2009), reaffirmed and incorporated by reference, 356 NLRB 152 (2010), *enfd.* 672 F.3d 1085 (D.C. Cir. 2012). Therefore, an employer has a duty to furnish such information in a timely fashion or adequately explain why the information will not be furnished. This duty requires a reasonable, good-faith effort to respond to the request "as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993); See also *Woodland Clinic*, 331 NLRB 735, 737 (2000).

C. Respondent Violated Section 8(a)(5) and (1) of the Act by Failing and Refusing to Provide the Union with Information Initially Requested on January 23, 2020 in Connection with the Fleming and Walton Grievances

I find that Respondent violated Section 8(a)(5) and (1) of the Act by ultimately failing to provide the Union with requested information even after the Union explained the necessity of and modified the requests on several occasions (at the behest of Respondent). First, the requests concerning the two grievances pending arbitration, filed by employee and Union

representatives Fleming and Walton in July 2019, are presumptively relevant. Both seek information regarding grievances which challenge terms and conditions of unit members' employment and adverse actions believed to have violated provisions of the CBA. One of the underlying incidents occurred on July 19, 2019, when OR management allegedly awarded an agency/contract non-bargaining unit nurse an available overtime shift over an eligible bargaining unit nurse. The other incident happened on July 22, 2019, when OR management allegedly permitted a per diem nurse to work a full shift while cancelling that of a full-time bargaining unit nurse. These grievances went to the core responsibilities of union representation—defending employees through the grievance and arbitration processes and enforcing an existing contract. *A.S. Abell Co.*, above at 1112–1113. (GC Exhs. 5–6.)

Kaseta continuously disparaged and rejected the Union's information requests by pointing out invalid grievances, inconsistencies in the information sought and grievances filed and untimeliness. In doing so, she challenged the relevance of the information requests. For example, on February 13, Kaseta claimed the Union referenced both grievances as requesting information regarding "cancellation" of shifts when only one of them mentioned cancellation of a nurse's shift. She asked the Union to specify the relevance of each request as she was "unable to ascertain the relevance of each request as written without further explanation." In addition, she asked the Union to delineate which request pertained to AAA case 4371 and which to AAA case 4373. (GC Exh. 2, pp. 034–035.)

On the same date (February 13), Lotorto explained that that AAA case 4371 related to the per diem nurse on July 20, 2019, being permitted to work while a full-time staff nurse was "cancelled" in the OR.¹⁹ He similarly stated that AAA case 4373 involved the agency nurse on July 19, 2019, being allowed to work while a full-time staff nurse was "cancelled" in the OR. He further described how the Union needed names of, wages and duration of and time off for any nurses cancelled in each case to determine those affected by the breach of the CBA's cancellation order. He elucidated the need for names of the contracted agency nurses and per diem staff nurses assigned to work on January 19 and January 22, 2019, to determine those nurses permitted to work in place of a full-time staff nurse. He explained the cancellation rotation for the month of July 2019 would be used to examine the Hospital's order of cancellation and whether more than one nurse was cancelled on each day. (GC Exh. 2, pp. 035–036.)

At this point, I give the Hospital some benefit of the doubt and find Kaseta reasonably asked for clarification and relevance of the Union's request. Lotorto referenced both underlying grievances as pertaining to cancellation of shifts when one involved an improper denial of an overtime shift. However, there is no doubt that both underlying grievances alleged similar violations of CBA provisions when bargaining unit nurses lost (by cancellation) or were denied shifts (overtime) out of order to per diem and non-bargaining unit contract nurses. Moreover, after further explanation by Lotorto and response by Kaseta, I

¹⁹ Lotorto misstated the date of the second incident involving the per diem nurse as July 20 instead of July 22, 2021. Kaseta seemed to harp on this error even after Lotorto made the correction in a subsequent email. (GC Exh. 2, pp. 035–036)

find that it became obvious to Kaseta exactly what information the Union sought and why. On February 19, Kaseta essentially repeated the same relevancy concerns. On February 20, Lotorto corrected the date on his request from July 20 to July 22, 2019 and clarified that in both cases, at least one nurse was cancelled out of order. He further explained that “[t]he case was filed as a class action on behalf of the bargaining unit and includes all affected RNs due to the low census cancellation order in the CBA not being followed/contract interpretation.” (GC Exh. 2, pp. 038–049.)

Kaseta relentlessly maintained the Hospital’s position on lack of relevancy for most of the Union’s requests but on February 28, replied to requests 1–3, that “Danny Walton was not cancelled on July 22, 2019.” She did not, however furnish any other information, including complete responses to requests 1–3 regarding any nurses who were cancelled or denied overtime on July 19, 2019 (GC Exh. 2, p. 040.) Indeed, the response that Walton was not cancelled does not tell the Union if any other nurses were cancelled. On March 2, Lotorto insisted, as the grievance forms reveal, that the Union had not claimed that Walton and Fleming were the alleged cancelled nurses in either grievance. Rather, the Union sought to determine which nurses were cancelled on those dates.

In her March 2 email, Kaseta continued to reject the Union’s rationale including characterization of the grievances as class actions since they failed to meet the criteria in the CBA to specify more than one affected nurse in each case. (GC Exh. 2, p. 043–044.) Kaseta insisted to the end that she could not “explain or imagine how the Union could justify” the relevancy of “separate requests concerning bargaining unit nurse cancellations on July 19, 2019.” However, it is evident by assertions in her March 2 email, Kaseta clearly understood the nature of and distinctions in the Union’s request. For example, she pointed out that had the Union complied with the contract, it would already possess “information concerning the identity and schedule of the full-time bargaining unit nurse it alleges was cancelled on July 22, 2019.” She also asserted that, “the Union should already possess information concerning the identity and schedule of the bargaining unit nurse it alleges should have received the overtime shift allegedly awarded to a non-bargaining unit nurse on July 19, 2019.” (Id.) Therefore, despite her insistence to the contrary, I find that by March 2, if not before, Kaseta understood the relevance of and Union’s need for the information. In doing so, I also find that Lotorto sufficiently (and cumulatively) explained the relevance of the Union’s request in his emails to Kaseta.

I further find that for the foregoing reasons, the Union has established the relevancy and need for the requested information concerning all non-bargaining unit contract nurses, in addition to the bargaining unit per diem nurses, who worked on July 19 and July 22, 2019. This includes the name(s) of their agencies as requested in Lotorto’s February 20 email. (GC Exh. 2, pp. 138–040.)

I dismiss the Hospital’s arguments that irregularities in the underlying grievances generally and specifically regarding the class action allegations deem the information request irrelevant. These very cases are headed to arbitration where an arbitrator will decide their procedural validity and substantive merit. As previously stated, the Board does not pass on

the merits of a Union's claim that an employer breached a contract. *E.I. Du Pont de Nemours & Co.*, 366 NLRB 178 above slip op. at 5. Nor does it determine whether procedural defects violate a contract or deem information requests void or irrelevant. *John Wiley & Sons, Inc.*, 376 U.S. 543 (1964) (arbitrator rather than the court is appropriate forum to determine if grievances meet procedural prerequisites under a CBA); Where requested information relates to pending grievances and existing contract provisions, it is "information that is demonstrably necessary" to the union "if it is to perform its duty to enforce the agreement." *A.S. Abell Co.*, above. Whether the Hospital likes it or not, there is clearly a dispute between the parties about if and how the Hospital implemented and may have violated the CBA provisions concerning order of cancellation and overtime assignments. Thus, the Union held a reasonable belief that the contract had been violated based on objective evidence from its Unit. See *Racetrack Food Services*, 353 NLRB 687 (2008). This belief did not have to be dispositive, accurate, or even, ultimately reliable and could be based on hearsay. *In re CEC, Inc.*, 337 NLRB 516, 518 (2002) (no requirement for a union to show information "that triggered its request was accurate or ultimately reliable," and its request "may be based on hearsay."); *Union Builders, Inc.*, 316 NLRB 406, 409 (1995). Nor did the Union need to be entirely sure of the degree to which the contract had been violated or show in advance exactly how the information employees might provide would be useful or reliable. See *Blue Diamond Co.* 295 NLRB 1007 (1989).

Therefore, I agree that the Union and not the employer, should decide what information can be of use to it. See *FirstEnergy Generation, LLC.*, 362 NLRB 630, 636 (2015). In the same vein, a union is entitled to verify an employer's assertions or representations regarding relevance and the information sought. See *Finch, Pruyn & Co.*, 349 NLRB 270, 275–277 (2007), *enfd.* 296 Fed. Appx. 83 (D.C. Cir. 2008). Finally, the Hospital's argument that the Union claimed new reasons at trial for needing the information also fails. To the contrary, the Union in its various emails to Kaseta in 2020 repeated its need to monitor the contract and pursue the grievances on behalf of the entire nurses' unit.²⁰ Notwithstanding this evidence, the Union's duty to perform these functions is not limited by the exact wording on the grievance forms. Consequently, for the forgoing reasons, I find that from March 2 to the present, Respondent failed and refused to provide the relevant and necessary information requested in the Union's January 23 requests 1–6 in violation of Section 8(a)(5) and (1) of the Act.

D. Respondent Violated Section 8(a)(5) and (1) of the Act by Failing and Refusing to Provide the Union with Information Requested on February 18, 2020

On February 18, the Union requested presumptively relevant information concerning its investigation of RN Whiteduck's termination. (GC Exh. 3, p. 029.) On March 3, Brogan

²⁰ See *Chapin Hill at Red Bank*, 360 NLRB 116, 116 (2014) (request not moot by resolution of a grievance as it had present and continuing relevance for the union to determine if respondent was complying with the CBA); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991) (information involving any stage of arbitration is relevant and should be provided and goal is also to encourage resolution of disputes short of arbitration hearings). In addition, I have considered all the Hospital's other arguments and defenses including those not specifically mentioned here and find they have no merit based on by analysis above.

expressed her belief that it was “remarkable that [your union] would file a grievance without any information regarding an alleged violation.”²¹ “[A]s a courtesy” rather than the Hospital’s obligation, Brogan furnished documents responsive to requests 1, 5, 6, and 8. She claimed not to understand the relevance of: the ED unit schedule for 2/17/20 in request 2; a
 5 copy of the schedule of all ED employees on the date of the alleged incident in request 3; and the patient assignment lists for all ED staff for on 2/17/20 in request 4. (GC Exh. 4, pp. 001–004.)

10 In an undated email, Lotorto explained that he was not seeking names of patients in request 4, but only asking for Whiteduck’s patient assignment. For requests 2 and 3, he sought the ED schedule to determine “potential witnesses.” For request 8, he stated that the Union needed all information relied upon by the Hospital including notes, witness lists, and statements to evaluate the grievance. (R. Exh. 1.) First, I find the Hospital failed to rebut the presumption of relevance regarding information related Whiteduck’s February 17 discharge.
 15 It involved the Union’s representation of a unit employee disciplined for conduct pursuant to the CBA and allegedly in violation of Hospital policies. Although, Brogan claimed not to understand the relevance of the items requested, it should have been obvious that they were sufficiently related to Whiteduck’s discharge and any subsequent grievance and arbitration. Regarding any issue with documentation regarding the non-unit employees, including contract
 20 employees, supervisors, physicians, and EMTs, present on February 17, I find that while not presumptively relevant, the Union has shown relevancy. Contract or other non-unit employees, as well as the unit employees, would have worked and been potential witnesses to the conduct resulting in Whiteduck’s termination. Moreover, in her insistence that the Hospital just did not understand the relevance of requests 2 through 3, she failed to articulate
 25 the reasons for her objections. (GC Exh. 4, pp. 005–027.)²²

In the April 14, 2020 letter, not provided to the Union until February 18, 2021, Brogan reserved the right to object to the requests as overly broad, vague, ambiguous and irrelevant, but named “Doreen Merenich” presumably as the only witness to the incident resulting in
 30 Whiteduck’s termination. Regarding request 4, Brogan responded that “Mr. Whiteduck was assigned to care for six patients at the time of the events that resulted in his termination on February 17, 2020.” (R. Exh. 2.)

35 Upon finally receiving these responses in February 2021, the Union acknowledged they fully satisfied requests 2 and 8 but only partially satisfied requests 3 and 4. I find that Brogan’s provision of “Doreen Merenich” as the only witness was not fully responsive to request 3 that also asked for the schedule of all ED employees who worked on February 17, including but not limited to, management, contract, physician, and EMT employees. As discussed above, the Union, and not the employer, should decide what information can be of

²¹ It is more remarkable that Brogan’s test for relevancy (as did Kaseta’s) includes a requirement that the Union possess the information sought to investigate or pursue a grievance and arbitration before it makes its request.

²² Further, I find that the items requested were not overbroad, vague, ambiguous, or overly nonspecific. Quite the contrary, the requests were concise and specific to the date of the incident resulting in Whiteduck’s termination and month in which it occurred.

use to it and a union is entitled to verify an employer's assertions or representations regarding relevance and the information sought. See *FirstEnergy Generation, LLC.*, above at 636, and *Finch, Pruyn & Co.*, above at 275–277. Since Lotorto narrowed the Union's intent to “merely...seek the Grievant's patient assignment list for the date of the alleged incident,” I find the Hospital satisfactorily responded to request 4. Therefore, I find the Hospital ultimately only failed to furnish the Union with information sought in request 3 in violation of Section 8(a)(5) and (1) of the Act.²³

E. Respondent Unreasonably Delayed in Providing Information Requested on February 18, 2021

In this case, the Hospital delayed in providing the Union with the previously prepared information, dated April 14, 2020, when Brogan inadvertently failed to transmit it to the Union until she prepared for trial in February 2021. (R. Exh. 2.) She attributed her failure to the distraction of the onset and continued effects of COVID-19. There is no dispute that this past year has presented unprecedented, extraordinary challenges and circumstances. Therefore, it is understandable that her responsibilities during the pandemic increased immensely to include dealing with new hospital protocol and ensuring patient and staff safety. (Tr. 149–150.) However, the evidence belies Brogan's explanation for delay in that she promptly responded to the Union's information request within about 10 days (on March 3) of receiving it. Despite the pandemic, she also prepared the materials dated April 14, 2020 on or before April 14, and pursuant to her testimony, responded to dozens of emails from the Union. She even confirmed that the request was not unduly burdensome nor difficult to fulfill. Further, between April 14, 2020 and February 18, 2021, the Union filed its unfair labor practice charge and the Region investigated the charge, filed the consolidated and corrected complaints and assigned trial dates. I find that during that time, the Hospital by either Brogan or its counsel had ample opportunity before February 2021 to discover it had not transmitted these documents.

The Board uses a totality of the circumstances test to determine whether a party has unreasonably delayed in providing relevant, necessary information. This standard includes consideration of the nature of the information; difficulty in obtaining it, including the complexity and extent of information sought; the amount of time taken to provide it; the reasons for the delay; and whether the reason was contemporaneously communicated to the requesting party. *TDY Industries, LLC d/b/a ATI Specialty Alloys & Components, Millersburg Operations*, 369 NLRB No. 128, slip op. at 2 (2020); *YP Advertising & Publishing LLC*, 366 NLRB No. 89 (2018); *General Drivers, Warehousemen & Helpers Local Union No. 89*, 365 NLRB No. 115, slip op. at 2 (2017). The Board has found that this analysis is an objective one and does not turn on “whether the employer delayed in bad faith...but on whether it supplied the requested information in a reasonable time.” *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 3–4 (2018).

The Board has found that a respondent violated the Act even where respondent's official had inadvertently “forgotten to provide the information when she received it from the

²³ The Hospital's obligation to provide all documentation in request 4 was only limited by Lotorto's modification.

respondent, and then supplied it” 3.5 months later. *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4. The Board has also affirmed an administrative law judge finding that, “[t]o the extent that Respondent delayed in providing such information, regardless of whether such failure was inadvertent or the result of error, such delay has been in violation of its obligations under the Act.” *Lenox Hill Hosp.*, 362 NLRB 106, 112–115 (2015). Further, the Hospital’s delay in providing responses until February 18 far exceeds cases in which the Board has found delays of 2 ½ months, a little over 5 weeks and even 1 month to be excessive. See *Bundy Corp.*, 292 NLRB 671 (1989); *Postal Service*, 308 NLRB 547, 550 (1992); *Postal Service*, 310 NLRB 530, 536 (1993); *Woodland Clinic*, 331 NLRB 735, 737 (2000).

Considering the totality of the circumstances, I find the Hospital unreasonably delayed in furnishing to the Union the information in requests 2, 3, 4, and 8 from April 14, 2020 to February 18, 2021 in further violation of Section 8(a)(5) and (1) of the Act.²⁴

F. Respondent Violated Section 8(a)(5) and (1) of the Act by Refusing to Participate in Grievance Discussions with the Union’s Counsel Present

Since March 3, 2020, the Hospital has refused to participate in a meeting with the Union’s attorney concerning a grievance the subject of which is Lotorto’s conduct in another grievance matter. I find that the Hospital’s refusal violates the Act. Board precedent establishes that employees, employers, and unions have a right under the Act to designate representatives of their choice for labor negotiations and “grievance adjustment” except under extraordinary circumstances. Section 7 states that, “[e]mployees shall have the right . . . to bargain collectively through representatives of their own choosing.” The Board has concluded, therefore, that Section 7 “encompasses the right of employees, acting through their union, freely to select their representatives for the processing of grievances.” See *Missouri Portland Cement Co.*, 284 NLRB 432, 433 (1987) (citations omitted); *United Parcel Serv.*, 330 NLRB 1020, 1020 (2000). A party refusing to meet with another party’s bargaining representative has the burden to prove that the representative “[had] created by their own actions an atmosphere of such ill will that good-faith bargaining is virtually impossible or that their participation...otherwise represents a clear and present danger to the bargaining process.” *Id.*; see also, *People Care, Inc.*, 327 NLRB 814, 824 (1999). The evidence in this case presented no such circumstances. Instead, the only concerns raised by the Hospital related to their non-attorney representatives, including Brogan, not being able to match Walters’ extensive experience and expertise as a labor attorney.

The Hospital raises as an affirmative defense that the Union violated Section 8(b)(1)(B) and 8(b)(3) of the Act by even asking for Walters to be present during a grievance meeting. These are the same violations alleged against the Union and dismissed by the Region in *PASNAP (Wilkes-Barre Hospital, LLC d/b/a Wilkes-Barre General Hospital)*, Case No. 04–CB–260483. On August 19, 2020, the Region determined the Union had not violated

²⁴ See also, *Linwood Care Center*, 367 NLRB No. 14, slip op. at 5 (2018) (6 weeks unreasonable delay); *Regency Service Carts, Inc.*, 345 NLRB 671 (2005) (16 weeks unreasonable delay).

Section 8(b)(1)(B) “by coercing the Hospital in the selection of its representatives for purposes of the adjustment of grievances.” The Region also decided the Union had not violated Section 8(b)(3) “by making unilateral changes to the parties’ grievance system” when it sought to have Walters appear on certain Step 4 grievances. The Region recognized that although evidence suggested that party attorneys did not become involved before the arbitration stage, the parties’ CBA permits changes to each side’s representative and apparently does not prohibit them from designating legal representatives. Thus, the Region found no evidence that the Union sought to unilaterally change or had changed any CBA provision. Nor was there evidence that the Union “made any demand, or even a suggestion, regarding the Hospital’s representatives, and the Union never refused to meet or otherwise conditioned any bargaining based on the identity of the Hospital’s representatives. Rather, the Union simply exercised its right to select a representative of its own choosing.” (GC Exh. 10.) Subsequently, on September 24, former General Counsel Robb denied Respondent’s appeal from the Region’s dismissal. (GC Exh. 11.)

The Hospital objected to the admission into the record of the dismissal and denial on appeal. However, I overruled this objection since the Region’s and Board’s conclusions are relevant in that they involve the same 8(b) allegations against the Union. It does not matter that they present here as affirmative defenses. As did the Region and General Counsel, I find the Hospital has not presented evidence to support its argument that the Union violated the Act, absolving it of liability on this issue. There is no record evidence of a CBA provision forbidding the parties from having legal representation during the grievance process. Nor is there evidence that the Union demanded that or attempted to force the Hospital to acquire counsel. The Hospital argues that the Union missed its two opportunities, on January 15 and July 15 of each year, to provide it with written notice of all its authorized Union representatives or other advocates pursuant to CBA Article 12, Section 8, second paragraph. However, as set forth above, the Hospital neglected to mention that the same provision also permits the Union to alternatively and immediately notify the Hospital of any modification to its representatives. (GC Exh. 8.) In this case, Lotorto promptly notified the appropriate management official, Brogan, on March 3 that the Union would be including Walters as a representative in the February 26 grievance filed against it.

I also reject the Hospital’s assertion that it did not violate the Act because Lotorto wanted Walters to represent him personally. The Hospital’s grievance against the Union directly implicated Lotorto in serious, unlawful conduct towards Brogan when he tried to represent Whiteduck on February 17. It sought remedies including suspension of Lotorto’s visiting privileges at the facility for a period of no less than 60 calendar days and an agreement that should he engage in any comparable offenses in the future, he would be subject to permanent expulsion from the Hospital’s property. Given the significance of the charge against the Union and the potential negative effect on Lotorto’s ability to represent the Union in future matters, including Step 4 and arbitration claims, the Union’s desire to have legal counsel is reasonable. Therefore, I find the Hospital’s refusal to permit the Union’s attorney to be present during a grievance meeting from March 3 to the present violates Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By failing and refusing to fully furnish to the Union the relevant information requested in its January 23, 2020 requests 1 through 6 relating to AAA Case No. 01–19–0002–4373 and AAA Case No. 01–19–0002–4371, Respondent has violated Section 8(a)(5) and (1) of the Act.

2. By failing and refusing to fully furnish to the Union the relevant information requested in its February 18, 2020 request 3 relating to the termination of Joseph Whiteduck, Respondent has violated Section 8(a)(5) and (1) of the Act.

3. By delaying in furnishing the Union with relevant information requested in its February 18, 2020 requests 2, 3, 4, and 8, from April 14, 2020 to the present, relating to the termination of Joseph Whiteduck, Respondent has violated Section 8(a)(5) and (1) of the Act.

4. By failing and refusing to participate in grievance discussions involving the Union’s legal counsel from March 2, 2020 until the present, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices described above have affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent shall cease and desist from refusing to bargain collectively and in good faith with the Union by delaying in and refusing to provide relevant information it needs to represent unit employees. In addition, the Respondent shall immediately and completely furnish the Union with all the information responding to its January 23, 2020 requests 1 through 6 and its February 18, 2020 request 3. Finally, Respondent shall cease and desist from failing and refusing to participate in grievance discussions involving the Union’s legal counsel.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

ORDER

The Respondent, Wilkes-Barre Hospital Company LLC d/b/a Wilkes-Barre General Hospital, Wilkes-Barre, Pennsylvania, its officers, agents, successors, and assigns, shall

²⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Refusing to bargain collectively with Wyoming Valley Nurses

Association/Pennsylvania Association of Staff and Nursing Professionals (the Union) as the exclusive collective-bargaining representative of the employees described in Article 1, Section 1 of the collective-bargaining agreement between Respondent and the Union effective from January 30, 2019 until January 31, 2022, by failing and refusing to fully furnish the Union with all of the information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative for unit employees.

(b) Refusing to bargain collectively with the Union by failing and refusing to fully furnish to the Union all the information requested in its January 23, 2020 requests 1 through 6 relating to AAA Case No. 01-19-0002-4373 and AAA Case No. 01-19-0002-4371.

(c) Refusing to bargain collectively with the Union by failing and refusing to fully furnish to the Union all the information requested in its February 18, 2020 request 3 relating to the termination of Joseph Whiteduck.

(d) Refusing to bargain collectively with the Union by delaying in providing all the information requested in its February 18, 2020 information requests 2, 3, 4, and 8 relating to the termination of Joseph Whiteduck.

(e) Failing and refusing to participate in grievance discussions involving the Union's legal counsel from March 2 until the present.

(f) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a prompt and complete manner all the information in its January 23, 2020 requests 1 through 6 relating to AAA Case No. 01-19-0002-4373 and AAA Case No. 01-19-0002-4371.

(b) Furnish to the Union in a prompt and complete manner all the information requested in its February 18, 2000 request 3 relating to the termination of Joseph Whiteduck.

(c) Upon request, participate in grievance discussions involving the Union's legal counsel.

(d) Within 14 days after service by the Region, post at its facility in Wilkes-Barre, Pennsylvania, copies of the attached notice marked “Appendix.”²⁶ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60

5 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are
10 not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 2020.

15 (e) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

20 Dated, Washington, D.C. April 27, 2021



Donna N. Dawson
Administrative Law Judge

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²⁶ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Wyoming Valley Nurses Association/Pennsylvania Association of Staff and Nursing Professionals (the Union) by failing and refusing to furnish it with information relevant and necessary to its performance of its functions as the collective-bargaining representative of our bargaining unit employees such as that contained in its January 23, 2020 requests 1 through 6, relating to AAA Case No. 01-19-0002-4373 and AAA Case No. 01-19-0002-4371.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with information relevant and necessary to its performance of its functions as the collective-bargaining representative of our bargaining unit employees such as that contained in its February 18, 2020 request 3, relating to the termination of Joseph Whiteduck.

WE WILL NOT refuse to bargain collectively with the Union by delaying in furnishing it with information relevant and necessary to its performance of its functions as the collective-bargaining representative of our bargaining unit employees such as that contained in its February 18, 2020 requests 2, 3, 4, and 8 relating to the termination of Joseph Whiteduck.

WE WILL NOT refuse to participate in grievance discussions involving the Union's legal counsel.

WE WILL furnish the Union in a prompt and complete manner all the information in its January 23, 2020 requests 1, 2, 3, 4, 5, and 6 relating to AAA Case No. 01-19-0002-4373 and AAA Case No. 01-19-0002-4371.

WE WILL furnish the Union in a prompt and complete manner all the information requested in its February 18, 2020 request 3 relating to the termination of Joseph Whiteduck.

WE WILL, upon request, participate in grievance discussions involving the Union's legal counsel.

WILKES-BARRE HOSPITAL COMPANY LLC
d/b/a WILKES-BARRE GENERAL HOSPITAL

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Wanamaker Building, 100 Penn Square, East, Suite 400, Philadelphia, PA 19007
(215) 597-7601 Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/04-CA-259936 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354